No. 16-877

IN THE

# Supreme Court of the United States

AUSTIN "JACK" DECOSTER AND PETER DECOSTER,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF

Although the government now spills much ink trying to cast Petitioners as bad actors, neither the charges it pursued nor the convictions that followed rest on any degree of malfeasance.

This case instead involves a supervisory liability crime—one in which "the liability of managerial officers [does] not depend on their knowledge of, or personal participation in, the act made criminal by the statute," *United States* v. *Park*, 421 U.S. 658, 670 (1975). *Park* liability rests on the notion that "by virtue of the relationship he bore to the corporation, the [defendant] had the power to prevent the act complained of." *Id.* at 671. When a company commits a regulatory crime, every officer or employee with relevant responsibility does too. *Id.* at 672. An individual's "consciousness of wrongdoing" is irrelevant. *Id.* at 669.

In that regard, this is a typical *Park* case. Petitioners were unaware that harmful bacteria had worked their way into the company's eggs. Pet. App. 158a–159a, 174a–175a. That is undisputed. The government also stipulated that Petitioners' company initiated egg tests in July 2010, shortly before the outbreak, "and none of these eggs tested positive," *id.* at 142a, and further that Petitioners took a number of steps to minimize a bacteriological risk endemic to poultry, *id.* at 140a–141a. Nonetheless, a judge concluded after the fact, under a preponderance standard, that Petitioners should have done more.

That is an ordinary basis for requiring one person to pay money to another. But it is unprecedented that these two findings—imputed liability for a regulatory infraction, plus civil negligence—were here deemed sufficient to warrant sending Petitioners to *prison*.

Until this case, appellate courts unanimously held, *categorically*, that statutes imposing liability "for acts or omissions [the defendant] has the power to prevent," "may not [be] use[d] to incarcerate." *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367-68 (11th Cir. 1999). The Eighth Circuit said here that such statues *sometimes* may be used to incarcerate—in cases where a defendant "fail[ed] to exercise reasonable care." Pet. App. 21a (concurrence).

This Petition asks the Court to resolve the resulting split on whether (and if so, when) due process permits imprisonment for a supervisory offense. It also requests review of a logically antecedent question that could avoid the constitutional question—whether *Park* should be overruled insofar as it held that Congress imposed supervisory liability merely by stating that those who "caus[e]" an FDCA violation commit a crime. See 21 U.S.C. § 331. The government opposes review of both questions, but offers no sound reason to defer review of critical constitutional and statutory questions that have been brewing for many years—and have become even more pressing now that *Park* defendants are being sent to prison.

## I. THE COURT SHOULD REVIEW WHETHER PETITIONERS' SENTENCES VIOLATE DUE PROCESS.

The government does not deny that the decision below is the first of its kind—the only appellate decision ever to hold that a supervisory offense may be punished by sending the "responsible corporate officer" to prison. It nonetheless contends that the time for review has not yet come, claiming that (1) the Eighth Amendment rather than due process controls this question; and (2) this case is distinguishable from cases holding that due process does not permit imprisonment for supervisory liability crimes. The first

claim is a merits argument, and an insubstantial one. The second mischaracterizes the cases that make up the split.

1. The government cannot identify any decision that embraces its theory that the Eighth Amendment precludes consideration of a due process claim relating to sentencing. Indeed, it concedes (Opp. 17–20) that every lower court addressing the constitutionality of incarceration for a supervisory offense has analyzed it under due process principles.

For good reason, the court below did too. Pet. App. 7a–13a. Petitioners contend they may not be incarcerated for their supervisory offense conviction. A claim to "[f]reedom from imprisonment … lies at the heart of the liberty th[e Due Process] Clause protects," *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001), which is why this Court has "made clear beyond peradventure" that "due process … protections" apply to sentencing, *Apprendi* v. *New Jersey*, 530 U.S. 466, 484 (2000).

The only sentencing case cited by the government accords with these principles. In *Chapman* v. *United States*, 500 U.S. 453, 465–66 (1991), this Court considered and addressed the merits of a due process challenge to sentencing. To be sure, it rejected that challenge; but that some due process arguments are *wrong* does not support the government's misguided position that *none may be brought*.[1]

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[1] Indeed, the government conceded in *Park* that "incarceration" would implicate "due process." Tr. of Oral Arg. 6, *United States* v. *Park*, 421 U.S. 658 (1975) (No. 74-215). The government now claims this concession arose only because Mr. Park "played no role in day-to-day operations" of the contaminated warehouse. Opp. 13 n.4. But Mr. Park "was on notice" of the problems "at Acme's warehouses" and "aware of the deficiencies"

2. The government next claims that because "[P]etitioners themselves" breached a duty "to prevent their company from violating" the FDCA, this case neither implicates due process limits on incarceration for "vicarious" crimes nor presents a conflict. Opp. 9–10, 17. Not so. Even if supervisory and "vicarious" offenses could be distinguished, but see *Meyer* v. *Holley*, 537 U.S. 280, 287 (2003) (*Park* imposes an "unusually strict" form of "traditional vicarious liability"), every relevant precedent involves a *Park*-style supervisory offense. They all ask whether a supervisor held criminally liable for failing to prevent a company from violating the law may be jailed as punishment for that failure.

That is inescapably true of the Eleventh Circuit's decision in *Lady J.* While the government attempts to distinguish this decision based on its references to "*respondeat superior*" (Opp. 18), the opinion clearly concerned *Park*-style liability. The Eleventh Circuit read the ordinance to "mean that an owner-defendant is only responsible for acts or omissions that he has the power to prevent." 176 F. 3d at 1367. It drew this interpretation straight from *Park*, explaining that this Court "upheld [Mr. Park's] conviction because, as president, he was in a 'responsible relation' to the unlawful failure to maintain sanitary warehouses," *id.* (citing 421 U.S. at 673–76), and that "[a] defendant is in a 'responsible relation' if he has the power to prevent violations from occurring," *id.* (citing 421 U.S. at 670–73). It then held that "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.'" *Id.* That holding squarely

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in the company's remedial measures. 421 U.S. at 677–78. And even this mistaken distinction goes to the merits of the due process claim, not to whether the Eighth Amendment bars it.

ruled out imprisonment for *Park*-style supervisory offenses.

The same holds true for the state-court decisions discussed in the Petition (at 15–16). They too addressed criminal laws that "hold the [defendant] liable if he fails to prevent" a subordinate's violation, and thus require employers "to exercise sufficient control over their employees to assure their compliance," *Davis* v. *City of Peachtree City*, 304 S.E.2d 701, 703 (Ga. 1983); *State* v. *Young*, 294 N.W.2d 728, 730 (Minn. 1980) (defendant "must control his own business and the men he employs"); *Commonwealth* v. *Koczwara*, 155 A.2d 825, 828-29 (Pa. 1959) (statute creates a "duty … to control the acts and conduct of" employees"); see also *People ex rel Price* v. *Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 476 (N.Y. 1918) (statute imposed on employer a "nondelegable duty" to "neither create nor suffer [violations] in his business"). Like this case, these precedents addressed punishment for defendants who failed to prevent a company from violating the law. But unlike the Eighth Circuit, the highest courts of Georgia, Minnesota, and Pennsylvania all found that due process principles preclude imprisonment.

Nor is it true (*contra* Opp. 17) that these decisions relied on state law alone. *Davis* held that imprisonment "cannot be justified under the due process clauses of the Georgia or United States Constitutions." 304 S.E.2d at 703. *State* v. *Guminga* said "the statute in question does violate the due process clauses of the Minnesota and the United States Constitutions." 395 N.W.2d 344, 345 (Minn. 1986). And each State treats its Due Process Clause as coextensive with federal guarantees. *Miller* v. *Deal*, 761 S.E.2d 274, 279 n.11 (Ga. 2014); *Caba* v. *Weaknecht*, 64 A.3d 39, 45 n.8 (Pa. Commw. Ct. 2013); *Sartori* v.

*Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). The split is just as deep and one-sided as we described.

3. The government also tries to avoid review by arguing that Petitioners were sentenced not for their *Park* offenses alone, but also based on a negligence finding by the district judge. Opp. 11. This factor does not obviate the split. It simply describes the Eighth Circuit's (erroneous and isolated) side of it.

*Lady J.* and the state-court decisions that forbid incarceration for supervisory offenses view the character of the *offense* as dispositive. They ask whether the "offense" established by the legislature requires "individualized proof" of "unlawful act" or "unlawful intent." *Lady J.*, 176 F.3d at 1368; see also *Koczwara*, 155 A.2d at 830. If not, they hold the law invalid to the extent it authorizes imprisonment. See *Lady J.*, 176 F.3d at 1368 (ordinance "may not [be] use[d] … to incarcerate"); *Guminga*, 395 N.W.2d at 345 (statute "on its face … violate[s] … due process"); *Davis*, 304 S.E.2d at 702–03 ("ordinances violate … due process" because they do not require "actus reus or mens rea").[2] A *Park* offense cannot satisfy this standard because "the liability of managerial officers [does] not depend on their knowledge of, or personal participation in, the act made criminal by the statute," 421 U.S. at 670; see *Lady J.*, 176 F.3d at 1367.

The Eighth Circuit announced a far more permissive test, relying on the district court's conclusion that Petitioners "'knew, or should have known,' of the risks posed by the insanitary conditions … , 'knew, or should have known' that additional testing needed to be performed … , and 'knew, or should have known' of

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[2] *Davis* referred to negligence (Opp. 19) only in summarizing the defendant's argument. 304 S.E.2d at 702.

the proper remedial and preventative measures." Pet. App. 80a; see *id.* at 9a–10a.

Under the Eighth Circuit's test, a defendant convicted of a supervisory liability offense may be imprisoned *if* a judge further finds that the defendant "fail[ed] to exercise reasonable care," Pet. App. 21a (concurrence), and thus committed *civil* "common-law negligence," *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 236 (1995) (Stevens, J., concurring and dissenting) ("Under ordinary tort principles, every person has a duty to exercise reasonable care …."); *e.g.*, *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 759 (1998) ("An employer is negligent … if it knew or should have known about [violative] conduct and failed to stop it.").[3]

These two tests are incompatible. The traditional rule is that such convictions *cannot* result in jail time, consistent with the historical treatment of these offenses as being "in the nature of a civil proceeding." *Queen* v. *Stephens* (1866) L.R. 1 Q.B. 702, 708; Pet. 24–26; cf. *Koczwara*, 155 A.2d at 827 ("pure food and drug acts" are "essentially noncriminal"). The Eighth Circuit's new rule is that convictions for such offenses can *sometimes* result in jail time, depending on whether a *civil* negligence finding is stacked on top of an offense traditionally regarded as quasi-civil. That conflict merits review.

4. Review is particularly warranted because the opposition does not disavow the government's aggressive campaign of *Park* prosecutions, see Pet. 21–22 (collecting cases), and notably refuses to confirm or

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[3] The government notably does not dispute that the courts below did not apply the more stringent *criminal* negligence standard, and did not even suggest that a criminal negligence standard was met. Pet. 18.

deny whether there are other *Park* cases, in addition to those identified by Petitioners, that have resulted in prison time, Opp. 27.

Regardless, the danger is clear and present. Because there is essentially no defense under *Park*, such a charge naturally induces a guilty plea. See Opp. 10–11; Brief of *Amici* National Association of Criminal Defense Lawyers, Cause of Action Institute, and National Association of Manufacturers 7–9. The government can then ask the sentencing judge to find negligence, because it can always be claimed that a supervisor "knew or should have known" about the risk that a violation would occur within the "business process" for which he "share[s] responsibility." Opp. 25. And the government will contend that every resulting prison sentence is immune from constitutional scrutiny because it is "based on [the defendant's] own acts and omissions, which the courts below found were negligent." *Id.* at 13. The law has never before sanctioned such a slippery slope from liberty to prison. The Court should review the Eighth Circuit's aberrant decision now, before it becomes entrenched in prosecutorial practice.

## II. THE COURT SHOULD OVERRULE *PARK* AND *DOTTERWEICH*.

The government does not deny that Petitioner's constitutional challenge arises only because *Park* construed the FDCA as imposing supervisory liability. Nor does it deny that the constitutional question could be avoided if *Park* and *Dotterweich* were overruled or revised. Cf. *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014).

The latter concession largely resolves the government's waiver arguments, which are rooted in the acknowledged facts that Petitioners pleaded guilty

and did not make the futile request that the lower courts overrule this Court's binding decisions. Opp. 20–22. Waiver principles "are not jurisdictional or absolute but prudential," and may be "outweighed by other considerations," Shapiro et al., *Supreme Court Practice and Procedure*, § 6.26(e) (10th ed. 2013), including the propriety of "resolv[ing] a statutory issue" in order to "avoid reaching … broad constitutional issues," *id.* § 6.26(h). Indeed, this Court, on its own motion, sometimes directs parties to address whether the Court should overrule a precedent instead of reaching a question presented, *e.g.*, *Patterson* v. *McLean Credit Union*, 485 U.S. 617, 617–18 (1988) (per curiam), or "decide[s] a case on nonconstitutional grounds even though the petition for certiorari presented only a constitutional question," *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (citing cases).

This Court also "permit[s] review of an issue" that would otherwise be waived "so long as it has been passed upon" below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). And—contrary to the government's claim—the FDCA's construction was addressed below. Judge Gruender concluded, "as a matter of constitutional avoidance," that § 331 should be read "not to impose vicarious liability on executives." Pet. App. 19a–20a. His decisive vote below thus was based on his understanding that Petitioners' convictions rested on and established negligence.[4] *Id.* at 20a–21a. All three opinions below, in fact, reflect the close relationship between the statutory and constitutional questions. See *id.* at 9a–10a, 18a, 20a–21a,

[4] That description of the convictions was incorrect. Petitioners were charged and pleaded guilty solely as "Responsible Corporate Officers of Quality Egg." Pet. 9.

26a–29a. It would be entirely sensible for this Court to review both together.[5]

The case for review is underscored by the government's shallow defense of *Park* and *Dotterweich*. Apart from general invocations of *stare decisis*, the government's sole contention is this: The FDCA's statement that "[t]he following acts and the causing thereof are prohibited," 21 U.S.C. § 331, is "*naturally* read to impose liability on those who 'share[] responsibility in *the business process* resulting in unlawful distribution' of the regulated article." Opp. 25 (emphasis added) (alteration in original).

That supposedly "natural" reading ignores that criminal-law causation has always been cabined by principles of proximate cause. See Pet. 28–29; *Burrage* v. *United States*, 134 S. Ct. 881, 887–90 (2014). The government makes no effort to explain how *Park* or its argument here can be squared with those principles—or with the rule of lenity, which surely precludes such a broad and unanchored reading of the text. Pet. 30.[6]

Nor would reconsidering *Park* and *Dotterweich* reverberate "throughout federal law," Opp. 26–27—unless the government means it might bring the

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[5] Insofar as the government's concern is that Petitioners agreed not to challenge their *conviction*, that is a question of remedies, not the scope of review. Petitioners expressly preserved their contention that they may not be incarcerated, and would be entitled to at least that relief if the Court revises its interpretation of the FDCA in their favor.

[6] Although Congress twice considered overruling these decisions (Opp. 24), "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute,'" *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

FDCA in line with other criminal statutes. Consider *United States* v. *Wise*, 370 U.S. 405, 409 (1962), which indeed cited *Dotterweich* (Opp. 26) in holding that the Sherman Act imposes liability on "all officers who have a responsible share in the proscribed transaction." But nobody thinks the Sherman Act makes a criminal of everyone who stands in "responsible relation" to an antitrust violation. *Wise* instead held that "a corporate officer is subject to prosecution … whenever he *knowingly participates in effecting the illegal contract, combination, or conspiracy*." 370 U.S. at 416 (emphasis added).

That is our point. A "natural" reading of the FDCA would create a far narrower sweep of liability than what *Park* endorsed. It would not give rise to the constitutional sentencing questions discussed above. And it would cure the distinct due process problem posed when prosecutors are granted standardless power to choose which individuals to prosecute for a company's offense. Pet. 33. The Court should revisit *Park*, apply standard principles of statutory construction to the FDCA's causation clause, and place identifiable limits on the government's power to punish individuals for FDCA violations.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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